

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 17-0616

CARL CLARK,

Petitioner, Plaintiff Below,

v.

KANAWHA COUNTY BOARD OF EDUCATION,

Respondent, Defendant Below.

(FROM THE CIRCUIT COURT OF KANAWHA COUNTY, NO. 15-C-1470)

PETITIONER'S BRIEF

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ASSIGNMENT OF ERROR

- I. The Circuit Court erred in granting respondent's Motion for Judgment as a Matter of Law pursuant to Rule 50 of the *West Virginia Rules of Civil Procedure* by finding that respondent's articulated legitimate, non-discriminatory reasons for the posting of petitioner's job and decision not to re-hire him were "undisputed."**

STATEMENT OF THE CASE

This is an appeal from a judgment as a matter of law entered by the Kanawha County Circuit Court at the conclusion of the petitioner's case-in-chief on his age discrimination claims against the respondent. Petitioner, Carl Clark was first employed by the respondent in 1971 as a certified teacher and as an athletic coach of multiple teams, including head boys' basketball coach, at Woodrow Wilson Junior High School. Appendix Record (hereinafter "Appendix"), at 20. In 1977, he moved to Stonewall Jackson High School, where he was also hired as assistant boys' basketball coach. *Id.* In 1979, he was also hired as Stonewall High School's head girls' basketball coach. Appendix, at 21. He remained at Stonewall in those positions until SJHS and Charleston High Schools were consolidated into Capital High School in 1989. In his 12 years as SJHS assistant boys' coach, the boys' team won three state championships and was state runner-up twice. As SJHS head girls' coach, the girls' team won two state championships, went undefeated in three consecutive seasons, and was runner-up one year. *Id.*

After consolidation in 1989, Coach Clark became employed at Capital High School as a teacher, as assistant boys' basketball coach and as head girls' basketball coach. *Id.* In 1994, the CHS head boys' coach (Coach Vencil) needed to take a year off due to an illness in his family. He approached Coach Clark and asked if Clark would serve as head coach for a year, but agree to step back down once Vencil could return. Clark agreed and was named head boys' coach in 1994. *Id.* He continued as head girls' coach as well. The next year, Coach Vencil decided he could not

return as coach. Coach Clark was then offered the position permanently. He accepted, conditioned on being able to finish his duties that same season as head girls' coach, which he did. Appendix, at 22.

Coach Clark ultimately served as assistant boys' head coach at Capital High School for five years and as boys' head coach for another twenty-one years. Appendix, at 21, 23. During his time as head coach at CHS, he was selected as MSAC Coach of the Year multiple times, was selected as statewide Coach of the Year; his teams won two state titles and was runner-up for the state title once; and his teams won numerous regional and sectional championships. Appendix, at 24. In his basketball coaching career, he was the first black coach to win a state championship in girls' basketball; the first black coach to win a state championship in boys' basketball; one of only two coaches ever to win state championships in both girls and boys basketball; and the only coach to ever win back-to-back state championships in both girls and boys basketball. *Id.*

In 2012, Coach Clark's first wife passed away. Appendix, at 29. In 2014, Coach Clark remarried, made the decision that he needed to spend more time with his family, and decided to retire as a teacher. Appendix, at 30. However, he desired to continue as head coach of the CHS boys' team. He discussed these options with long-time CHS principal Giles and with CHS athletic director Cody Clay, who had just come on the job a few months earlier. Appendix at 30, 142. Principal Giles told Clark he could continue as head coach despite his retirement. Appendix, at 30. Coach Clark specifically did not quit his coaching position. Appendix, at 47.

Coach Clark tendered his resignation as a teacher on October 1, 2014, prior to the beginning of basketball season. Appendix at 26, 32, 190. Despite the fact he was no longer employed as a certified teacher by the County, the job was not declared vacant or posted for new applications. Appendix, at 32. Rather, Coach Clark was hired as CHS head boys' basketball coach by contract

dated November 7, 2014. Appendix, at 192. That contract provided, in pertinent part, that Clark would perform the duties of head basketball coach during school year 2014 – 2015. *Id.* “School year” is defined by law as July 1 to June 30. *W. Va. Code* § 18-1-2; *W. Va. Code of State Rules* § 126 C.S.R. 126-73-4.9. The basketball season ended on March 10, 2015. However, there were still job duties to be performed by the head coach within the 2014 – 2015 school year, specifically a period in the last three weeks of June including outreach to incoming ninth-graders; practices for returning players; open work-outs for other boys that wanted to try out for the team; and organized scrimmages and shoot-arounds in different parts of the state and the local area. Appendix, at 40.

In January, 2015, CHS principal Giles resigned. Appendix at 78. David Miller then became acting principal. Appendix at 30, 78. At the end of the season in March, 2015, Coach Clark discussed with both David Miller and Cody Clay that Coach Clark desired to continue as coach and neither Miller nor Clay expressed concerns about his ability to do so. Appendix, at 30-31.

In April, 2015, without any further discussion with Coach Clark, Clay informed Miller that Clark’s position was now deemed vacant due to his retirement and had to be posted. Appendix, at 30, 31, 162. Despite Clark’s existing contract and despite the fact that job duties remained to be performed under the contract, respondent declared the CHS head boys basketball coaching job to be vacant and posted it as available to other applicants. Appendix, at 193.¹ This was done as Coach Clark and his wife were gone on vacation in late April, 2015. Appendix, at 31.

After Coach Clark learned of the posting, he immediately used a laptop to electronically apply for the position. Appendix, at 32.

¹ In just this one posting, 13 coaching positions at CHS were listed. It is telling that every new CHS coaching hire for school year 2015-2016 was under the age of 40. Appendix, at 229.

In May of 2015, Larry Bailey came on as the new CHS principal. Appendix, at 78. Coach Clark then interviewed for a position he had held for 21 years, with the new principal, two vice-principals, and the athletic director, all of whom had less than 3 years' experience at Capital High School and all of whom were under the age of 40. Appendix, at 229.

The panel interviewed a number of applicants. However, per Principal Bailey, Cody Clay instructed the panel that Matthew Green, a 35 year old applicant, was the only candidate who could be considered to be offered the position. Appendix, at 79. Despite being specifically told that it had to offer the position to Green, the panel went ahead and interviewed all applicants, without informing those applicants they could not even be considered in light of Green's application. Appendix, at 80, 81, 138.

Cody Clay prepared a set questions to ask each applicant. Appendix, at 87. The panel chose not to deviate from the questions in any way, including asking any type of follow up or clarification questions. Appendix, at 86, 87. These questions included the following: "What are your career goals as a basketball coach? Where do you see yourself in five years? What kind of commitment can you give us if you were given this position?" Appendix, at 204. Clay testified he would have wanted a firm commitment of that nature. Appendix, at 171-2. Coach Clark knew he had no chance when he saw the composition of the panel and was asked these questions. Appendix, at 35-37.

The respondent's rationale that it had no discretion in relation to the hiring is that at the time the interviews were conducted in May, the state rules and school policy promulgated pursuant to those rules provided a mandatory preference that employed certified teachers must be hired before non-employed certified teachers. Accordingly, respondent contends since Clark had

retired, he was no longer an “employed” certified teacher – meaning it had a non-discretionary duty to hire Green, an “employed” professional teacher.²

Importantly, Cody Clay admitted he was already aware by this point that this hiring preference was being removed by amendment to the rules that was going into effect on June 12, 2015.³ Appendix, at 165. Principal Bailey testified he told Cody Clay that he wished he did not have to replace the longstanding head coach within weeks of assuming the principal’s position, but Clay did explain that there was any other choice. Appendix, at 83, 84, 88. Principal Bailey also testified that Clay informed him the position had to be filled within 30 days of it being posted. Appendix, at 83.⁴

Principal Bailey admits that now that he has a better understanding of the rules, and he sees that Clay was wrong about those statements (Appendix, at 95) and admits that (1) coaching positions should be posted only after they “become vacant;” (Appendix, at 84) (2) that there was no prescribed time for the position to be posted after it became vacant (Appendix, at 165) (3) that the position did not, in fact, have to be filled within 30 days of the posting (Appendix, at 81, 82); and (4) that there was no prohibition from either waiting to fill the position until after the rule change on June 12 or conditioning the re-hiring of Coach Clark upon him once again becoming employed as a certified teacher with the County (Appendix, at 135).

² Principal Bailey admitted that despite Clay informing the interview panel that the 35 year old Green was the only candidate under this preference that could be considered, there was another candidate, Beatty, who qualified for the preference. Beatty was an older teacher who had served for years as an assistant coach under Clark. Appendix, at 79-80.

³ Again, prior to the end of the 2014-2015 school year and while there were still head coaching duties left to be performed under Clark’s contract.

⁴ Cody Clay disputed this at trial. (Appendix, at 188).

Coach Clark was hired by respondent as a certified teacher in the position of a substitute, on June 8, 2015. Appendix, at 220. Again, this was before the end of the school year and before all the duties of the head coach had been performed. As his contract had not ended, the Board breached his contract by declaring it vacant prior to the end of the school year. In light of his re-hiring as a certified teacher on June 8, 2015, the position should never have been posted at all. Principal Bailey admitted that if Clark had not retired (i.e. remained an “employed” certified teacher), the position would “never have been posted.” Appendix, at 114. The coach hiring policy provides “Certified teachers may hold a coaching position indefinitely, without advertising, contingent upon the recommendation of the principal and approval of the board.” Appendix, at 205. In the absence of a requirement to post the position, then principals do not post the jobs as available “as long as he doesn’t commit some immoral act or do something crazy.” Appendix, at 127-128.

Even with the position posted, if the panel had waited four more days to make its recommendation, it would not have been subject to the preferential hire rule. Instead, respondent hired Matthew Green, a 35 year old, to replace petitioner, a 68 year old, on June 8, 2015 – the same day it re-hired Clark as a certified teacher substitute. Appendix, at 220.⁵

To add insult to injury, once Green was hired, Principal Bailey called Coach Clark and offered to hire him as Green’s assistant. Appendix, at 39.

SUMMARY OF ARGUMENT

The Court erred in granting defendant's Motion for Judgment as a Matter of Law pursuant to Rule 50 of the *West Virginia Rules of Civil Procedure*, because the facts elicited during

⁵ Of all eight CHS coaching positions hired by the Board on that date, all of them were under the age of 40.

petitioner's case in chief – and the permissible inferences a reasonable jury could have drawn therefrom - were subject to multiple and varying interpretations.

In this case, the petitioner submitted evidence to the jury as follows:

He was 68 years of age when two adverse employment decisions were made in relation to his coaching position: first, that it was declared vacant in the first place, and second, that he was not the successful candidate.

Petitioner submitted evidence that he was replaced by a 35 year old; respondent stipulated that *every* new coaching hire at CHS during the relevant year was under the age of 40; and stipulated that *every* person that participated in the interview and recommendation panel in relation to whether petitioner should be re-hired were under the age of 40.

In relation to his job being improperly declared to be vacant in April, 2015, petitioner presented a multitude of evidence which could support a jury verdict in his favor, including: a written contract that showed he was hired to perform the duties of head basketball coach for the 2014-2015 school year (which by law did not end until June 30, 2015); that there were multiple duties of the job left to be performed in that year, particularly in the last three weeks of June; that he had multiple conversations with the school's administration about his desire to continue in the position of head coach; that the administrators assured him he would continue as head coach; that no one told him of any intention to post his job as vacant; that the job should not be posted until it was, in fact, vacant; but that the job was posted before it was, in fact, vacant; that petitioner was not notified his job had been posted until he had left the state on vacation; and that if his job had not been declared vacant, he would have retained his position.

In relation to not being selected as the candidate once the job was posted, the petitioner submitted evidence that showed Cody Clay manipulated the interview panel in multiple ways, including (1) incorrectly informing the administration that the job had to be posted immediately upon being declared vacant; (2) incorrectly informing the panel that the position had to be filled within 30 days of being posted as vacant; (3) that there was no prohibition for the panel either delaying to fill the position for four days until after the rule change on June 12 took away the “preferential rehire” provision for currently employed teachers or for conditionally selecting Coach Clark with the requirement that he become re-employed as a certified teacher with the County before the next school year began; (4) writing an interview “script” and keeping the panel from deviating from it in any way; and (5) including questions about the length of future commitment the applicants could serve, where they saw themselves in five years, and expecting candidates to make commitments to the panel of availability beyond the next school year.

The respondent and its witnesses denied any discriminatory animus in their decision making. However, to have a triable issue to reach a jury on a discrimination claim in this state it is not required that plaintiff elicit a direct, blatant confession of discrimination; and further, a reasonable jury could find in favor of a discrimination plaintiff without such direct admission..

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner submits this case is appropriate for oral argument under Rules 18 and 19 of the West Virginia Rules of Appellate Procedure because this case involves a complicated set / series of facts and the facts and legal arguments would be significantly aided by oral argument. Further this case (1) involves assignments of error in the application of settled law; (2) involves claims of an unsustainable exercise of discretion where the law governing that discretion is settled; and (3)

claims insufficient evidence existed to determine a jury could not rule in petitioner's favor under any circumstance.

ARGUMENT

The Circuit Court erred in granting respondent's Motion for Judgment as a Matter of Law pursuant to Rule 50 of the *West Virginia Rules of Civil Procedure* by finding that respondent's articulated legitimate, non-discriminatory reasons for the posting of petitioner's job and decision not to re-hire him were "undisputed."

I. STANDARD OF REVIEW

"When a motion is made for a directed verdict, the court should entertain every reasonable and legitimate inference favorable to the litigant opposing such motion fairly arising from the evidence, considered as a whole, and assume as true those facts which a jury might properly find under the evidence." Syl. Pt. 1, *Lambert v. Goodman*, 147 W.Va. 513, 129 SE 2d. 138 (1963).

This Court's standard of review on the trial court's granting of a judgment as a matter of law is *de novo*. *Gillingham v. Stephenson*, 209 W. Va. 741, 551 S.E.2d 663 (2001). "We apply a *de novo* standard of review to the grant or denial of a pre-verdict or post-verdict motion for judgment as a matter of law. After considering the evidence in the light most favorable to the nonmovant party, we will sustain the granting or denial of a pre-verdict or post-verdict motion for judgment as a matter of law when only one reasonable conclusion as to the verdict can be reached." See Syl. pt. 3, *Brannon v. Riffle*, 197 W. Va. 97, 475 S.E.2d 97 (1996).

In this case, the evidence was susceptible of multiple and different interpretations and more than one reasonable verdict could have been reached. This is demonstrated, at least in part, on the trial court's denial of respondent's summary judgment motion on nearly identical grounds. See, Appendix, at 7.

Pursuant to West Virginia Code §5-11-9, it is an unlawful discriminatory practice for an employer to fire or refuse to hire an individual based upon their age. West Virginia Code §5-11-9 states that: “It shall be an unlawful discriminatory practice...[f]or any employer to discriminate against an individual with respect to compensation, hire, tenure, terms, conditions or privileges of employment if the individual is able and competent to perform the services required even if such individual is blind or disabled...” Discrimination “means to exclude from, or fail or refuse to extend to, a person equal opportunities because of race, religion, color, national origin, ancestry, sex, age, blindness, disability or familial status and includes to separate or segregate.” West Virginia Code §5-11-3.

“In order to make a *prima facie* case of employment discrimination under the West Virginia Human Rights Act, W.Va. Code §5-11-1 et. seq. (1979), the plaintiff must offer proof of the following:

- (1) That the plaintiff is a member of a protected class.
- (2) That the employer made an adverse decision concerning the plaintiff.
- (3) But for the plaintiff’s protected status, the adverse decision would not have been made.” Syl. Pt. 1, *Kanawha Valley Regional Transport Authority v. West Virginia Human Rights Commission*, 181 W.Va. 675, 383 S.E.2d 857, (1989) citing Syl. Pt. 3, *Conaway v. Eastern Associated Coal Corporation*, 178 W.Va. 164, 358 S.E.2d 423 (1986).

As this Court has held in the similar context of deciding a motion for summary judgment on a discrimination claim prior to trial:

Although the plaintiff has the ultimate burden of proving elements of the claim of discrimination by a preponderance of the evidence, the showing the plaintiff must make as to the elements of

the *prima facie* case in order to defeat a motion for summary judgment is *de minimis*. In determining whether the plaintiff has met the *de minimis* initial burden of showing circumstances giving rise to an inference of discrimination, the function of the circuit court on a summary judgment motion is to determine whether the proffered admissible evidence shows circumstances that would be sufficient to permit a rational finder of fact to infer a discriminatory motive. **It is not the province of the circuit court itself to decide what inferences should be drawn.**

Syl. Pt. 1, *Conrad V. ARA Szabo*, 198 W. Va. 362, 480 S.E.2d 801 (1996) (citing Syl. Pt. 4, *Hanlon v. Chambers*, 195 W. Va. 99, 464 S.E.2d 741 (1995) (emphasis added)).

In addition, the Supreme Court of West Virginia has consistently held that “courts should take special care when considering summary judgment in employment and discrimination cases because state of mind, intent, and motives may be crucial elements.” *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 61, 459 S.E.2d 329, 338 (1995). “Summary judgment is often imprudent in discrimination cases that present issues of motive or intent because, as recognized in *Williams*, ‘*credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge[.]*’” *West Virginia Human Rights Commission v. Wilson Estates Inc.*, 202 W.Va. 152, 160, 503 S.E.2d 6, (1998) citing *Williams* at 59, 459 S.E.2d at 336 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 91 L.Ed.2d 202, 106 S. Ct. 2505 (1986)); accord *Pierce v. Ford Motor Co.*, 190 F.2d 910, 915 (4th Cir. 1951) (holding that summary judgment should be denied “even where this is no dispute as to the evidentiary facts in the case but only as to the conclusions to be drawn therefrom.”) (emphasis added).

II. PETITIONER SUBMITTED EVIDENCE UPON WHICH A REASONABLE JURY COULD FIND IN HIS FAVOR. ACCORDINGLY, ENTRY OF JUDGMENT AS A MATTER OF LAW AGAINST HIM WAS IMPROPER.

Mr. Clark was approximately 24 years old when he began coaching basketball for Kanawha County Schools, approximately 42 when he started coaching at Capital High School, and 47 years of age when he took over as the head coach for the boys' basketball team. During his tenure as head coach of the Capital High School boys' basketball team, Coach Clark led the team to two AAA championships, 317 wins, and he was named MSAC Coach of the Year for the 2014-15 season. Coach Clark was never asked to reapply for his position as head coach prior to when he was asked to apply for the 2015-16 season.

According to the defendant, Coach Clark's position was given to another coach as a result of Coach Clark's retirement the previous year. However, Coach Clark retired on October 6, 2014 as a teacher with the Board of Education and was not required to interview for the position of head boys' basketball coach, nor was the position posted for applicants, before he later began the 2014-15 season as the head basketball coach. In fact, his contract to continue as the head basketball coach at Capital High School was not signed until November 7, 2014, a month after his last day as an employee with the Board. Further, that contract specifically defined the term of his contract to extend to the end of that school year, which by law was June 30, 2015. Respondent's witnesses admitted that there were duties remaining for the head coach to perform in June.⁶ Despite this, the respondents' representatives want the Court to believe that they were unable to wait until the policy change (a change defendant was well aware would be put into effect before the start of the season) took effect in order to allow Coach Clark to keep his position.

A. There is ample evidence to show that defendant's discriminatory actions were motivated by age.

⁶ Respondent argues that because the basketball season was over and they had paid petitioner for his service, that his contract had expired on its own terms. This argument ignores the clear language of the contract hiring Coach Clark to perform all duties of the position during the school year and permitting the parties to agree to payment prior to completion of all activities. Appendix, at 192

At the time of his termination, Coach Clark was 68 years old. Through a series of manipulative acts, the respondent's representatives, in particular, Cody Clay, replaced a coach with multiple state championships with a 35 year old. Further, under Cody Clay's watch, every coaching vacancy at CHS under his supervision was filled with applicants who were under the age of 40.

While the respondent denies it, the evidence shows that Cody Clay, the young Athletic Director who had just gotten the job in August, 2015, wanted the Capital High School basketball program to go in a new younger direction. Cody Clay saw an opportunity in the young 35 year old Matt Greene, son of George Washington High School's long time basketball coach. Prior to the 2014-2015 season, Clinton Giles was the long time Principal at Capital High School. Prior to the end of the 2015 season, Mr. Giles resigned his position. With a new inexperienced principal, Mr. Clay saw his opportunity to replace the aging Coach Clark with the younger Mr. Greene.

Mr. Clay was the one that made the determination that Coach Clark's position should be posted for the 2015-2016 year, despite the fact that it was not posted the previous year. Mr. Clay drafted the interview questions. Mr. Clay hounded Principal Bailey to conduct the interviews as soon as possible. According to Mr. Bailey, Mr. Clay also told him the position had to be filled within 30 days of being posted, which Mr. Bailey did not learn until much later was not true. Mr. Clay disputes he told Mr. Bailey that. Mr. Clay instructed the other members not to deviate from the interview questions. Mr. Clay made it very clear he was looking for a long term coach, someone willing to make "a commitment to Capital High School." Thus, he asked questions like where do you see yourself in five years; what kind of commitment can you give us; what are your career goals. Difficult questions at best when being asked of a 68 year old veteran who had been coaching since he was 24 years old. Also according to Mr. Bailey, Cody Clay instructed the panel

the only hireable candidate was Mr. Green. Again, Mr. Bailey learned much later that at least one other candidate could have been considered. Clay also disputed telling Bailey that as well.

Mr. Clay was aware that Mr. Greene was interested in the position of head basketball coach. Mr. Clay was also aware that Coach Clark wished to continue coaching. From October 2014 until he posted the job in April of 2015, Mr. Clay was aware that Coach Clark would lose his job if the selection process happened before the new law change on July 12, 2015. At no point in time did Mr. Clay advise Coach Clark that, despite previous interpretations, Coach Clark would lose his job if he was not employed. Critically, this is despite multiple conversations with Coach Clark where Clay expressed no concern about Clark continuing in the position.

Compounding the fact that Clay improperly declared the job was vacant and posting it for applications, Mr. Clay knew when the law regarding preferential hiring of employed certified teachers was changing and made certain that the interviews were conducted and a recommendation was made (1) before the law changed and (2) before Coach Clark could become re-hired as a certified substitute.

A jury could certainly find that Mr. Clay's actions were motivated by age.

B. The defendant selectively interpreted its policies to have Coach Clark removed as head basketball coach.

As stated above, Coach Clark retired from teaching in October of 2014. He was not asked to sign his new contract to coach the 2014-2015 season until November 7, 2014. If the respondent's position is correct, then the head coaching position for the 2014-2015 season should have been posted and interviewed for. Yet, Coach Clark was retained without the position being posted or any interviews being conducted. If respondent's interpretation of its own rules is accurate, then it violated its own rules by retaining Coach Clark for the 2014-2015 season.

The respondent now wants the Court to find that a reasonable jury can only believe that it had no choice but to replace Coach Clark for the 2015-2016 season. A jury can only believe that these policies cannot be deviated from. A jury can only believe that respondent could not wait one more day for Coach Clark's employment as a substitute certified teacher to be approved so that he would be protected by the preference instead of a victim of the preference; nor could respondent wait four more days for the law to change so that the preference would not work to Coach Clark's detriment at all. When the policy supports the respondents' position, it is unwaivable law that must be followed at all costs, however, when it does not please them, then the policies are more like guidelines that do not need to be followed. Further, as set forth above, there were multiple contradictions between the testimony of Cody Clay and Principal Bailey, as well as contradictions between the testimony of Mr. Shock (another member of the interview panel) and Cody Clay. (Appendix, at 140, 166). These are the very sorts of contradictions that easily could lead a reasonable jury to find that age played a role in the adverse employment decisions that were made.

A jury could reasonably look at the defendant's selective enforcement of its policies and / or conflicting testimony of its witnesses and determine that defendant's efforts to replace a 68 year old coaching icon with a 35 year old teacher were based at least in part on Mr. Clay's desire to go in a younger direction.

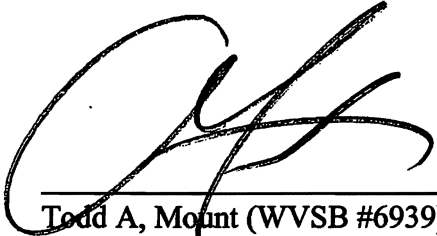
V. CONCLUSION

After considering the evidence in the light most favorable to the petitioner, the nonmoving party, the Circuit Court's granting of respondent's pre-verdict motion for judgment as a matter of law under Rule 50 must be reversed, because there was more than only one reasonable conclusion as to the verdict that could have been reached.

Respectfully submitted this 16th day of October, 2017.

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CERTIFICATE OF SERVICE

I, Richard W. Walters, counsel for the petitioner, Carl Clark, do hereby certify that a true and correct copy of “**Petitioner’s Brief**” and “**Appendix**” were served upon counsel of record this 13th day of **October, 2017**, by depositing the same in the U.S. Mail, postage pre-paid, to the following:

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